*United States Government*
*National Labor Relations Board*
OFFICE OF THE GENERAL COUNSEL

# Advice Memorandum

DATE: February 17, 2005

TO : Robert H. Miller, Regional Director
Region 20

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Professional Messenger
Case 20-CA-31707-1

530-6050-0825-3300
530-6067-4011-1100

This Section 8(a)(5) case was resubmitted for advice as to whether the Employer's decision to lay off its on-call drivers and subcontract their work was not a mandatory subject of bargaining because the Union could not have offered labor cost concessions sufficient to have changed the Employer's decision.[1]

We conclude that the Employer can meet the second affirmative defense under Dubuque that the Union could not have offered labor cost concessions sufficient to change the Employer's decision to subcontract. To match the Employer's anticipated net cost savings from its decision to subcontract, the Union would have had to offer concessions effectively bringing the employees below minimum wage. Accordingly, the decision to subcontract was not a mandatory subject of bargaining, and absent withdrawal, the instant charge should be dismissed.

[1] See Dubuque Packing Co., 303 NLRB 386, 391 (1991), enfd. in rel. part 1 F.3d 24 (D.C. Cir. 1993), cert. granted 511 U.S. 1016 (1994), writ dismissed 511 U.S. 1138 (1994). See also "Guideline Memorandum Concerning Dubuque Packing Co., Inc.," Memorandum GC 91-9, dated August 9, 1991 at p. 4 (hereinafter "Guideline Memo").

[*FOIA Exemption 5*

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FACTS

Professional Messenger (the Employer) provides letter and small package delivery services in the San Francisco Bay Area. In 2000, the Employer recognized the International Longshore and Warehouse Union, Local 6 (the Union) as the collective-bargaining representative of its employees in order to settle a Gissel complaint allegation. The Union represents a unit of bicycle messengers, drivers (including on-call and route drivers), walkers, and package handlers.

The parties are currently in a protracted process of bargaining a successor agreement to their initial one-year contract that expired in September 2001. Citing the fact that some of its competitors use independent contractors, the Employer sought economic concessions from the Union in bargaining.

On January 6, 2004,[2] the Employer's attorney advised the Union that the Employer had decided to lay off its on-call drivers effective later that month and to subcontract their work to a newly-formed company called TAG (Transportation Agent Grid).[3] The Union immediately demanded bargaining over the layoff/contracting-out decision and its effects. The Employer refused to bargain over the decision but agreed to bargain over the effects.

On January 26, the Employer laid off 31 employees, of whom 6 successfully bid on openings in the bargaining unit as route drivers. The Employer encouraged the laid-off drivers to apply for positions as independent contractors with TAG. According to the Employer, over 20 of its former employees are now working for TAG as independent contractors.

The Employer's letter to the Union announcing the layoffs stated that workers' compensation insurance cost increases were the main reason for implementing the decision to use TAG and its independent contractors. The Employer's position letters state that it was motivated by a desire to remain competitive with companies using independent contractors, and that it was mainly driven by "skyrocketing" workers' compensation insurance costs, which increased by approximately 100 percent in the preceding year. It contends that these costs are uncontrollable, and that they

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[2] All dates herein are 2004 unless otherwise noted.

[3] TAG is alleged in the instant charge to be an alter ego of Professional Messenger, but the Region has determined that there is insufficient evidence to support this allegation.

can change unexpectedly and dramatically. The Employer states that vehicle maintenance costs were a secondary factor. Based on the Employer's submission of workers' compensation payroll statements reflecting rate increases over the past year, as well as evidence of the amount of payments made to the State Compensation Insurance Fund (State Fund) over the same period, the Region has determined that workers' compensation insurance costs were the primary motivating factor in the Employer's decision.

Regarding these increased costs, the Employer asserts that as of July 2003, its workers' compensation rate for bike messengers and on-call drivers had increased to $65.35 per $100 in payroll. The Employer also contends that it experienced a 44.87 percent increase in employment taxes (including social security, FICA, Medicare, and SDI) per on-call driver from 2001 to 2003. During the same period, the Employer's costs for Company-owned vehicles, which were only operated by on-call drivers, increased by 124.5 percent. The Employer argues that workers' compensation insurance rates, employment taxes, and vehicle costs are expenses beyond the Union's and the Employer's control, and that the Union had no ability to offset these dramatic increases through collective bargaining.

Based on a comparison of the costs of continuing to operate using its own on-call drivers[4] and the costs associated with subcontracting with TAG for the on-call work,[5] the Employer estimated that the net savings resulting from subcontracting the work would be approximately $1,049,000 per year. The Employer contends that in order to equal this anticipated savings, the Union would have to make wage concessions of 83 percent (of a total of $1.180 million in drivers wages in 2003), and that the result would be an hourly rate well below the California minimum wage of $8.50 per hour. It also contends that it would have been

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[4] Including driver wages, driver mileage reimbursement, expenses relating to trucks (insurance, registration, gas, repairs, tickets, tolls, and parking), workers' compensation insurance costs, payroll taxes, radio expenses, health insurance, dispatch personnel wages, uniforms, truck leases, and advertising/ hiring expenses.

[5] According to the Services Agreement between the Employer and TAG, TAG supplies the communications system, dispatch services, pick-up and delivery services, and billing/ invoicing services to the Employer. In return, the Employer pays TAG 85 percent of the total revenue invoiced to the Employer's customers as a result of pickups and deliveries brokered by TAG.

impossible for the Union to have achieved the anticipated savings by reducing the drivers' total compensation (approximately $1.55 million, including health insurance premium contributions and mileage reimbursement) by 65 percent.

In 2003, on-call drivers apparently earned, on average, $38,065.[6] Each driver was also reimbursed an average of $11,022 per year for mileage expenses (based on miles actually driven); however, there is no evidence that this mileage reimbursement augmented the employees' income rather than simply reimbursing expenses incurred. Each driver apparently worked an average of approximately 400 overtime hours (for a total of 2,480 hours) per year. The annual minimum wage requirement for an employee working 2,480 hours in San Francisco would be $22,780.00.[7]

ACTION

We conclude that the Employer can meet the second affirmative defense under Dubuque that the Union could not have offered labor cost concessions sufficient to change the Employer's decision to subcontract. To match the Employer's anticipated net cost savings from its decision to subcontract, the Union would have had to offer concessions that would have effectively brought the employees below minimum wage.

As set forth in our October 12, 2004 Advice Memorandum in this case, the Employer's decision to subcontract its on-call delivery work should be analyzed under Dubuque Packing. Although Dubuque itself involved a work relocation decision, we conclude its principles apply to all "Category III" decisions that fall within the spectrum between Fibreboard[8] and First National Maintenance.[9]

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[6] This amount was calculated by dividing the $1.80 million in driver wages for 2003 by the number of drivers (31) laid off.

[7] $8.50 per hour (the minimum wage in San Francisco) multiplied by 2080 hours, plus $8.50 x 1.5 (for overtime pay) x 400 hours. The annual minimum wage would be $17,680 based on a 40-hour workweek.

[8] Fibreboard Corp. v. NLRB, 379 U.S. 203 (1964).

[9] First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).

Under Dubuque, in order to make a prima facie showing that a relocation decision is a mandatory subject of bargaining, the General Counsel has the burden of showing that the relocation involves the replacement of one group of employees for another, "unaccompanied by a basic change in the nature of the employer's operation."[10] The employer then has the burden of coming forward with evidence to rebut the prima facie case or to prove certain affirmative defenses. If the Board concludes that the employer's decision concerned the "scope and direction of the enterprise," the employer has no duty to bargain over the decision.[11] Failing that, the employer can still raise certain affirmative defenses to show that it had no bargaining obligation regarding the relocation decision. First, it can show that labor costs, direct or indirect, were not a factor in its decision. Second, if such costs were a factor in deciding to relocate the work, the employer may prove that, at the time it made its decision, the union could not have offered sufficient "concessions that approximate, meet, or exceed the anticipated cost or benefits that prompted the relocation decision."[12] In other words, the employer may show that the union could not have offered labor cost concessions sufficient to change the employer's decision.[13]

In our October 12 Advice Memorandum, we concluded that the General Counsel would be able to demonstrate a prima facie showing of a bargaining obligation under Dubuque and that the Employer would be unable to establish the first affirmative defense that its decision was not motivated by labor costs. Thus the remaining question is whether the Union could have offered sufficient labor concessions that could have changed the Employer's decision to subcontract.

In determining whether the Union could make sufficient wage concessions to offset the net savings, it is appropriate to consider whether the Union could have made the necessary level of concessions (totaling $1,049,000) without bringing employee wages below the minimum wage in San Francisco ($8.50 per hour).

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[10] 303 NLRB at 391.

[11] See Noblit Brothers, Inc., 305 NLRB 329, 330 (1992); Holly Farms Corp., 311 NLRB 273, 277-278 (1993), enfd. on other grounds, 48 F.3d 1360 (4th Cir. 1995), affd., 517 U.S. 392 (1996).

[12] 303 NLRB at 391.

[13] See Guideline Memo at pp. 4-6.

In 2003, the Employer spent approximately $342,000 per year on mileage reimbursement and $36,000 on health insurance premiums for the on-call drivers. Assuming that the Union was willing to give up mileage reimbursement and health care coverage, this would save the Employer approximately $378,000 per year, leaving $670,000 to be made up in wage concessions. If annual wages were reduced by approximately $394,419.00, the Employer would save about $670,000 in wages, workers compensation insurance premiums, and payroll taxes.[14] On average, therefore, each employee would be required to reduce his wages by approximately $12,723 per year, which would result in an annual average salary of $25,342.00. This concession would still amount to an hourly rate of $9.46 per non-overtime hour,[15] which is above the $8.50 minimum wage rate. However, it does not take into account that employees would no longer be receiving reimbursement for mileage expenses (which averaged $11,022 per employee per year).

In order to perform their jobs as drivers, the employees would be paying out-of-pocket for mileage expenses. Assuming that this reimbursement in the past had been no more than necessary to compensate for out-of-pocket mileage costs, extra maintenance due to mileage, and wear-and-tear on employees' vehicles, every dollar reduction in this reimbursement would be the equivalent of a dollar's reduction in an employee's salary.[16] Thus, the net effect is that the employees would be earning on average a maximum[17] of $14,320 per year, or $5.34 per non-overtime

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[14] This amount was calculated by dividing $670,000 by 1.6987, since every dollar not spent on wages results in an additional savings of 65 cents in workers compensation premium costs and 4.87 cents in payroll taxes.

We note that the necessary wage concessions would actually have to be higher, as this calculation does not take into account the significant tax advantage that the Employer would lose by not being able to deduct the wages from its corporate taxes.

[15] If X is the non-overtime hourly wage rate, and $2080X + (400 \times 1.5)X = \$25,342$, then $X = \$9.46$.

[16] Indeed, it would amount to even more than that because salary is subject to income tax, whereas expense reimbursements can be retained by an employee without income taxation.

[17] See note 16 above.

hour.[18] In order to make the labor concessions necessary to change the Employer's decision, the employees would effectively be earning well below minimum wage.

Under these circumstances, the Employer's decision to lay off its on-call drivers and subcontract their work was not a mandatory subject of bargaining under Dubuque because labor cost concessions by the Union could not have changed the Employer's decision. Accordingly, the Employer did not violate Section 8(a)(5) by failing to bargain over that decision, and absent withdrawal, the charge should be dismissed.

B.J.K.

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[18] If X is the non-overtime hourly wage rate, and 2080X + (400 x 1.5)X = $14,320, then X = $5.34.